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No. 98-253

In The

Supreme Court of the United States

October Term, 1997

COOKSEY BROTHERS DISPOSAL COMPANY, INC.,

Petitioner,

vs.

BOYD COUNTY, KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this Respondent is:

Whether Kentucky's lower appellate court, the Court of Appeals, correctly applied Kentucky case law when it decided that the Kentucky General Assembly correctly classified a municipal solid waste disposal facility as a public service company for property taxation.

PARTIES TO THE PROCEEDING

Petitioner, Cooksey Brothers Disposal Company, Inc., is a Kentucky corporation that operates a municipal solid waste landfill in Boyd County, Kentucky, pursuant to a license issued by the Kentucky Natural Resources and Environmental Protection Cabinet.

Respondent, Boyd County, Kentucky, is a local political subdivision of the Commonwealth of Kentucky.

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Respondent's Appendix contains the relevant documents from the proceedings below:

1. Trial Court's Findings of Fact, Conclusions of Law and Judgment granting judgment to the Respondent for $32,180.94: app. at 13.

2. Opinion of the Kentucky Court of Appeals dated December 12, 1997: app. at 1.

3. Order of the Kentucky Supreme Court denying discretionary review: app. at 18.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction under 28 U.S.C. § 1257 to hear this case. There is no construction or application of any federal statute or treaty involved in this case. Nor does this case present a state decision based upon a substantial and unsettled federal question arising under the U.S. Constitution. There is no conflict in this case among one or more federal circuits or between the state's interpretation of the issue and an interpretation of the same issue by this Court or any other federal court. This case was decided solely on independent and adequate state grounds. No substantial federal question or issue was presented in this case. Sup. Ct. R. 10. Therefore, the Petition for Writ of Certiorari should be denied.

CONSTITUTIONAL PROVISIONS

U. S. CONST. amend. XIV, § 1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

KY CONST. § 1 provides that "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

> First: The right of enjoying and defending their lives and liberties.
>
> Second: The right of worshipping Almighty God according to the dictates of their consciences.
>
> Third: The right of seeking and pursuing their safety and happiness.
>
> Fourth: The right of freely communicating their thoughts and opinions.
>
> Fifth: The right of acquiring and protecting property.
>
> Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
>
> Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to

prevent persons from carrying concealed weapons."

KY CONST. § 2 provides that "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

KY CONST. § 3 provides that "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

KY CONST. § 171 provides that "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

Any law passed or enacted by the General Assembly pursuant to the provisions of or under this amendment,

or amended section of the Constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections, or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section. The referendum petition shall be filed with the Secretary of State not more than four months after the final adjournment of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people under this section. All elections on measures referred to the people under this act shall be at the regular general election, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become a law when approved by the majority of the votes cast thereon, and not otherwise. The whole number of votes cast for the candidates for Governor at the regular election, last preceding the filing of any petition, shall be the basis upon which the legal voters necessary to sign such petition shall be counted. The power of the referendum shall be ordered by the Legislative Assembly at any time any acts or bills are enacted, pursuant to the power granted under this section or amended section, prior to the year of one thousand nine hundred and seventeen. After that time the power of the referendum may be ordered either by the petition signed by the five percent of the legal voters or by the Legislative Assembly at the

time said acts or bills are enacted. The General Assembly enacting the bill shall provide a way by which the act shall be submitted to the people. The filing of a referendum petition against one or more items, sections or parts of an act, shall not delay the remainder of that act from becoming operative."

KY.REV.STAT. ANN. 136.120(1) provides that "Every railway company, sleeping car company, chair car company, dining car company, gas company, water company, ferry company, bridge company, street railway company, interurban electric railroad company, express company, electric light company, electric power company, telephone company, telegraph company, commercial air carrier, air freight carrier, pipeline company, common carrier water transportation company, privately owned regulated sewer company, cable television company, *municipal solid waste disposal facility, as defined by KRS 224.01-010(15), where solid waste is disposed by landfilling,* railroad car line company, which means any company, other than a railroad company, which owns, uses, furnishes, leases, rents, or operates to, from, through, in, or across this state or any part thereof, any kind of railroad car including, but not limited to, flat, tank, refrigerator, passenger, or similar type car, and every other like company or business performing any public service, except bus line companies, regular and irregular route common carrier trucking companies, and taxicab companies, shall annually pay a tax on its operating property to the state and to the extent the property is liable to taxation shall pay a local tax thereon to the county, incorporated city, and taxing district in which its operating property is located." (emphasis added)

KRS 136.115(2) – provides that "Operating property" as used in KRS 136.120 through 136.180 means both the operating tangible property and the franchise, and the payment of taxes on the assessment of operating property shall be deemed the payment of taxes on the operating tangible property and the franchise.

COUNTERSTATEMENT OF THE CASE

This is a collection case. Boyd County, Kentucky, through its office of County Attorney, filed an action in Boyd Circuit Court in 1996 to collect delinquent property taxes owed by Cooksey Brothers Disposal Company, Inc. (hereinafter "Cooksey"), for the 1992, 1993, and 1994 tax years. The Complaint was later supplemented to include 1995 property taxes that became due as the litigation progressed. Cooksey filed an Answer and Counterclaim alleging that the tax was unconstitutional.

The public service corporation property tax, KRS 136.120, is assessed by the Kentucky Revenue Cabinet (hereinafter "Cabinet") against corporations enumerated by the Kentucky General Assembly. See page 5, *supra*. The Cabinet then allocates the assessment to the various local taxing districts based upon the location of the property subject to the tax. After notice to each company, the Cabinet certifies the assessment to each county clerk where property is located for local billing and collection. KRS 136.180.

Cooksey administratively challenged the Cabinet's assessments, thus delaying certification of the assessments until September, 1995. KRS 136.050(2) provides

that all such taxes are due within thirty (30) days after notice of the tax is given by the collecting officer, i.e., the Boyd County Sheriff. KRS 134.470 directs the county attorney to prosecute all remedies provided for the collection of these tax bills.

The Boyd Circuit Court's Judgment found the statute to be constitutional and awarded Boyd County, Kentucky, the sum of $32,180.94, which included tax, interest and penalties for four years. The Kentucky Court of Appeals affirmed the lower court's judgment. The Kentucky Supreme Court denied discretionary review. This Petition followed.

ARGUMENTS AND REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE STATES HAVE BROAD DISCRETION TO CLASSIFY PROPERTY FOR PURPOSES OF TAXATION.

Cooksey challenges the statutory classification of a privately owned solid waste disposal business as a public service company under KRS 136.120, alleging that this violates its rights under Kentucky Constitution §§ 1,2 and 3, as well as the Fourteenth Amendment. KRS 136.120 is an ad valorem tax which taxes the unit value of property, *Adams Express v. Kentucky*, 166 U.S. 171 (1897). The unit is divided into operating property and non-operating property. KRS 136.120(2). The franchise is defined as part of the operating property. KRS 136.115(2).

In *Eastern Kentucky Resources v. Arnett, Ky.*, 934 S.W.2d 270, 274 (1996), the Supreme Court of Kentucky

previously held "that solid waste disposal requires a franchise when it is performed by private parties." The court defined "franchise" as a "right or privilege granted by a sovereign power to a party to do some act which such party could not do without a grant from the government." *Eastern Kentucky Resources*, at 934 S.W.2d 275. Thus, Cooksey, which operates a solid waste disposal company, holds a franchise.

The Kentucky Court of Appeals ruled below that the General Assembly could classify and tax Cooksey as a public service company, which includes its franchise. KRS 136.115(2). Federal and state courts have consistently held that legislative bodies possess the greatest freedom in classifications in the field of taxation even more than in other fields. *Madden v. Kentucky*, 309 U.S. 83 (1940); *Delta Air Lines v. Revenue Cabinet, Ky.*, 689 S.W.2d 14 (1985). Indeed, the party challenging the constitutionality of a statute bears the burden of establishing that there is no conceivable basis for the taxation. *Madden*, at 309 U.S. 88; *Com., Revenue Cabinet v. Smith, Ky.*, 875 S.W.2d 873, 875, *cert. denied*, 513 U.S. 1000 (1994).

II. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONER HAS FAILED TO STATE AN IMPAIRMENT OF A SPECIFIC FEDERAL RIGHT.

Cooksey alleges generally that its federal rights to equal protection and due process under the Fourteenth Amendment have been violated because of its property tax classification.

> Where taxation is concerned, and no specific federal right, apart from equal protection, is

> imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). Cooksey failed to plead a violation of any specific federal right. Therefore, this Court should deny Certiorari.

Although violations of the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment to the Constitution are serious matters, and well within the jurisdiction of this Court, the mere mention of either clause does not automatically confer jurisdiction upon this Court to review a state decision about non-federal rights based on the Kentucky Constitution. In a well-reasoned decision, the Kentucky Court of Appeals ruled in this case that "The Fourteenth Amendment guarantees equal protection of the laws, and Sections 1, 2, and 3 of the Kentucky Constitution mirror that protection." (Appendix, p. 3.)

Cooksey readily admits that its principal business is the operation of a solid waste landfill that is physically located in Boyd County, Kentucky. There is no contention that the tax at issue was extended to property located elsewhere. In *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96 (1948), this Court opined that an ad valorem tax could be imposed upon local activities without affecting interstate commerce:

> We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its border. Of course, the interstate

> commerce could not be conducted without these local activities, but that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.

Accordingly, the Petition for Writ of Certiorari in the instant case should be denied.

CONCLUSION

For the reasons set forth hereinabove, Boyd County, Kentucky, respectfully demands that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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RENDERED: December 12, 1997; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

97-CA-0400-MR

COOKSEY BROTHERS DISPOSAL COMPANY, INC. — APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
CIVIL ACTION NO. 96-CI-0227

BOYD COUNTY, KENTUCKY — APPELLEE

OPINION

AFFIRMING

* * *

BEFORE: BUCKINGHAM, GUIDUGLI, and JOHNSON, Judges.

BUCKINGHAM, JUDGE. Cooksey Brothers Disposal Company, Inc., (Cooksey) appeals from a summary judgment in favor of Boyd County, Kentucky (Boyd County), in an action to collect unpaid public service corporation taxes. For the reasons set forth hereinafter, we affirm.

Boyd County filed suit against Cooksey alleging that Cooksey failed to pay local franchise taxes under Kentucky Revised Statute (KRS) 136.120. Cooksey answered and counterclaimed, admitting that it had not paid the taxes but asserting that, as a private business entity, it could not be constitutionally taxed under the statute as a

public service corporation. It sought to have the court declare KRS 136.120(1) unconstitutional as to municipal solid waste disposal facilities that dispose of solid waste by landfill and also challenged the assessment as double taxation in conjunction with the tax authorized by KRS 68.178. Holding the statute in question to be constitutional as it applies to these solid waste disposal facilities, the Boyd Circuit Court awarded summary judgment to Boyd County in the amount of $32,180.94. This appeal followed.

On appeal, Cooksey again argues that KRS 136.120 is unconstitutional as applied to municipal solid waste disposal facilities that dispose of solid waste by landfill, under Sections 1, 2, 3, 51, and 171 of the Kentucky Constitution and the Fourteenth Amendment to the U.S. Constitution, and that the statute is an impermissible double taxation when combined with KRS 68.178.

We may readily dispose of Cooksey's argument under Section 51 of the Kentucky Constitution, which requires that the subject of an act enacted by the General Assembly be expressed in the title and forbids an act from relating to more than one subject. Cooksey argues that the title to KRS 136.120, "PUBLIC SERVICE CORPORATION PROPERTY TAX; CLASSIFICATION; ASSESSMENT; CERTIFICATION," does not agree with its subject because municipal solid waste disposal facilities are not public service corporations. However, Section 51 requires that the title of an act agree with the body of the act, not that the title of a statute agree with the body of the statute. *Arciero v. Hager*, Ky., 397 S.W.2d 50, 53 (1965), *overruled in part on other grounds by Hicks v. Enlow*, Ky., 764 S.W.2d 68 (1989). The act which added municipal solid

waste disposal facilities to KRS 136.120 was Senate Bill 2 in the 1991 Extraordinary Session. It is entitled, "AN ACT relating to solid waste management and declaring an emergency." 1991 Kentucky Acts, Ch. 12. This clearly complies with Section 51.

Cooksey's position is better expressed in its remaining constitutional challenges. The Fourteenth Amendment guarantees equal protection of the laws, and Sections 1, 2, and 3 of the Kentucky Constitution mirror that protection. *Revenue Cabinet v. Smith,* Ky., 875 S.W.2d 873, 878 (1994). Section 171 of the Kentucky Constitution provides:

> The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

Cooksey asserts that since municipal solid waste disposal facilities in general and Cooksey in particular are not public service corporations, classification and taxation of these entities under KRS 136.120 is unconstitutional.

The General Assembly has broad discretion in making tax classifications. "[I]n a taxation case, unless a rational basis for such law can be completely refuted, then the law may stand as constitutional. Notably, the burden on the ones attacking the legislative tax arrangement is the negation of every conceivable basis which might support

it." *Smith, supra,* at 875. Still, a tax must apply equally to all in a class, it must not be unreasonable or arbitrary, and it should be based upon some reasonable distinction. *Reynolds Metal Co. v. Martin,* 269 Ky. 378, 107 S.W.2d 251 (1937). Courts will sustain classifications if there are substantial differences between the entities classified. *Id.*

KRS 136.120(1) provides:

> Every railway company, sleeping car company, chair car company, dining car company, gas company, water company, ferry company, bridge company, street railway company, interurban electric railroad company, express company, electric light company, electric power company, telephone company, telegraph company, commercial air carrier, air freight carrier, pipeline company, common carrier water transportation company, privately owned regulated sewer company, cable television company, municipal solid waste disposal facility, as defined by KRS 224.01-010(15), where solid waste is disposed by landfilling, railroad car line company, which means any company, other than a railroad company, which owns, uses, furnishes, leases, rents, or operates to, from, through, in, or across this state or any part thereof, any kind of railroad car including, but not limited to, flat, tank, refrigerator, passenger, or similar type car, and every other like company or business performing any public service, except bus line companies, regular and irregular route common carrier trucking companies, and taxicab companies, shall annually pay a tax on its operating property to the state and to the extent the property is liable to taxation shall pay a local tax thereon to the county, incorporated city, and

> taxing district in which its operating property is located.

(Emphasis added). The inclusion of municipal solid waste disposal facilities was added in 1991 with the enactment of Senate Bill 2.

"Operating property" is the operating tangible property and the franchise,[1] and payment of the tax on operating property is deemed payment of tax on the franchise. KRS 136.115(2). The Revenue Cabinet assesses the property of companies subject to this tax and certifies the values to local taxing authorities. KRS 136.120(3).

Corporations taxed under KRS 136.120 do not pay the corporation license tax required by KRS 136.070. A license tax is a tax levied for the privilege of existing and doing business within the state. 1 Ky. Tax Rep. (CCH) ¶ 5-001 (1997). KRS 136.070 requires corporations to pay taxes measured by the capital employed in business which is apportioned to Kentucky, with a minimum tax of $30.00. "Capital" includes capital stock, surplus, and borrowed money. KRS 136.070(2)(a). This tax is assessed by the Revenue Cabinet. In addition, corporations owning real or personal property in Kentucky are subject to the ad

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[1] A franchise has been defined as "a right or privilege granted by a sovereign power to a party to do some act which such party could not do without a grant from government." *Eastern Kentucky Resources v. Arnett*, Ky., 934 S.W.2d 270, 275 (1996). However, "[a] corporation's franchise may be one thing or another. The word is not always used with reference to the same meaning. It is sometimes regarded as the mere right to be a corporation." *Cumberland Telephone & Telegraph Co. v. Hopkins*, 121 Ky. 850, 856, 90 S.W. 594, 595 (1906).

valorem or property tax, KRS 132.020, assessed by local property valuation administrators (PVAs).

Cooksey argues that, until its amendment in 1991, KRS 136.120 applied to corporations all sharing the common quality of operating under franchises or special licensing arrangements. "Municipal solid waste disposal facility" as defined in KRS 224.01-010(15) and incorporated by reference in KRS 136.120 makes no reference to a franchise. On its face, it draws no distinction between corporations operating under a franchise or special privilege and those privately contracting for their customers. Cooksey's president stated in an affidavit that Cooksey privately contracts for its customers and has no franchise or exclusive contract with any government entity. There is no dispute that Cooksey is a municipal solid waste disposal facility disposing of waste by landfill, as those terms are used in the statute. The issue is whether it is constitutional to classify Cooksey and other similar corporations with public service corporations for tax purposes.

Cases interpreting Kentucky Statute (KS) 4077, the predecessor to KRS 136.120, explain that what the law taxed was the added value which the exercise by the corporation of any special or exclusive privilege or franchise not allowed by law to natural persons gives to the tangible property. *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 49 S.W. 1069 (1899). A later case, *Commonwealth v. Louisville Transfer*, 181 Ky. 305, 204 S.W. 29 (1918), held that "the intangible property value intended to be subjected to taxation by section 4077 is in reality that value which is given to tangible corporate property and the exercise of the franchise, arising out of

the exclusive or special character of the privilege granted." *Id.* at 307.

The circuit court expressed no particular justification for the classification. It concluded that there was no legal significance to the fact that Cooksey is not a public service corporation, like the other entities taxed under KRS 136.120. It wrote:

> The General Assembly has set forth a rational basis for including businesses that engage in solid waste disposal by the landfill method in KRS 136.120, and Cooksey has not demonstrated as a matter of fact or law that inclusion of that particular business is an unreasonable classification or special legislation that is somehow oppressive or hostile to Cooksey or its particular business. Nor has Cooksey met its burden to negative every conceivable basis which might support the franchise tax imposed upon its intangible assets, . . .

The cases interpreting KS 4077 are of little aid in analyzing KRS 136.120. Until the enactment of the general franchise tax in 1906, public service corporations taxed under KS 4077 were the only corporations taxed on the value of their franchises. "[C]orporations not possessing or exercising an exclusive privilege do not pay a franchise tax at all. The tax upon them is based alone upon the value of their tangible property. . . . " *Marion National Bank of Lebanon v. Burton*, 121 Ky. 876, 90 S.W. 944, 948 (1906). *See also* 1 Ky. Tax Rep., *supra*, ¶ 5-010. Today, each corporation pays a tax on its privilege to do business as a corporation in Kentucky, under either the license tax of KRS 136.070 or the public service tax of KRS 136.120.

KRS 224.43-010 states the policy and purpose for managing solid waste in the Commonwealth. As the statute was amended by Senate Bill 2 in 1991, the General Assembly stated that "[i]t is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management." KRS 224.43-010(2). One of the bill's goals was to reduce by 25 percent by 1997 the amount of municipal solid waste generated by Kentuckians. KRS 224.43-010(4). The general reason given by the General Assembly for solid waste legislation is "to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment." KRS 224.43-010(1).

In KRS 224.43-010, the General Assembly has expressed a legitimate state interest in solid waste disposal and has further stated that it desires to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities and to encourage a regional approach to solid waste management. KRS 224.43-010(2). In connection with its desire to control these matters, it has elected to cause municipal solid waste disposal facilities to be taxed along with public service corporations pursuant to KRS 136.120. By taxing such facilities in this manner, the Revenue Cabinet has the sole power to value and assess all of the property of each business. KRS 136.120(3). The effect of this is to centralize and bring uniformity to the assessment of these companies'

property.[2] We perceive a rational basis for the inclusion of municipal solid waste disposal facilities with public service corporations for taxation purposes, and Cooksey has not completely refuted that basis.

In *Reynolds Metal, supra,* the Depression-era court upheld a tax exemption for the banking industry because of the profound effect on the state economy and the need to keep interest rates low. *Id.*, at 262. In *Delta Air Lines, Inc. v. Commonwealth*, Ky., 689 S.W.2d 14 (1985), the court justified preferential treatment for truck lines and railroad lines due to their significance to the state economy. *Id.* at 18. In the case sub judice, the classification of municipal solid waste disposal facilities that dispose of waste by landfill with public service corporations singles out these corporations for tax assessment unlike any other type of waste disposal facility. Although this classification is not a perfect fit, it is reasonably related to the General Assembly's goals for solid waste management. The statute is constitutional since Cooksey has not refuted every conceivable basis to support the classification. *Smith, supra,* at 875.

Cooksey also contends that KRS 136.120, in combination with KRS 68.178, constitutes double taxation. Double taxation results where two or more taxes are "(1) imposed

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[2] Property owned by companies that are not taxed as public service corporations under KRS 136.120 is assessed by local PVAs. Such assessments are made by separate offices in each of the counties across the Commonwealth and may not be as consistent, from county to county, as central assessment by the Revenue Cabinet.

on the same property, (2) by the same state or government, (3) during the same taxing period, and (4) for the same purpose." *Fox v. Board for Louisville & Jefferson County Children's Home*, 244 Ky. 1, 13, 50 S.W.2d 67, 72 (1932). The circuit court's order made no mention of this argument. At any rate, we disagree with Cooksey's contention.

To meet the first requirement, Cooksey must show that the license fee authorized by KRS 68.178 taxes the same property as KRS 136.120. The license fee is based upon a percentage of gross receipts. Cooksey suggests that this is actually an occupational tax, citing *Commissioners of Sinking Fund v. Hopson*, Ky. App., 613 S.W.2d 621, 623 (1980) (license fee in city ordinance that did not regulate but was only revenue measure is an occupational tax). Cooksey then notes that "operating property" is defined as the operating tangible property and the franchise. KRS 136.115(2). Describing the franchise as the right to do the business for which the corporation was created, Cooksey concludes both taxes tax the right to operate a municipal solid waste disposal facility. We disagree.

In *Falls City Brewing Company v. Talbott*, 265 Ky. 541, 97 S.W.2d 57 (1936), Falls City challenged the imposition of a production tax, in addition to the corporate license tax and occupational tax it was already paying. The court observed that the problem of double taxation is generally confined to property taxes. It also quoted with approval from a 1924 treatise: "It is a settled rule that it is not double taxation to impose an ad valorem tax on property used in a business and also to impose a license tax on the

business or the use of the property." *Id.*, at 59. The court concluded that corporate license taxes, occupational taxes, and production taxes tax different taxable items and do not constitute double taxation. *Id.* at 60.

The taxes authorized by KRS 68.178 and KRS 136.120 tax different taxable elements. The latter statute taxes a corporation's tangible property, the former its gross receipts. The Revenue Cabinet assesses the operating property, defined by KRS 136.115(2) as the operating tangible property and the franchise, of a domestic public service corporation by its fair cash value as a unit. KRS 136.160(1). Although 136.115(2) deems payment of taxes on operating property to be payment of taxes on the franchise, Cooksey has not shown that Boyd County did, in fact, tax the value of a franchise under KRS 136.120. On the tax bill Boyd County sought to collect, Cooksey's property was assessed at two rates, real estate and tangible. Franchise is not mentioned.

Cooksey has not shown what, if any, license fee Boyd County actually adopted pursuant to KRS 68.178, or that it has imposed such a fee on Cooksey. Even if it has, and even if the fee authorized by KRS 68.178 can be characterized as a tax on Cooksey's right to do business, the public service corporation property tax under KRS 136.120 and the levy under KRS 68.178 are not double taxation.

Cumberland Telephone & Telegraph Co. v. Hopkins, 121 Ky. 850, 90 S.W. 594 (1906), cited by Cooksey, is distinguishable. In that case, a telephone company and a railroad company successfully challenged a local license tax. The Court reasoned that since the railroad was required

by charter to carry freight and passengers to Hopkins, and Hopkins had sold the telephone company the privilege of operating its line and conducting business in the city, the city could not also tax the companies for those same privileges. *Id.* at 597. In the case sub judice, Cooksey has no charter or special privilege from Boyd County on which to be taxed.

KRS 136.120 is constitutional as applied to Cooksey and other municipal solid waste disposal facilities, and there is no impermissible double taxation. There were no material facts in issue, and Boyd County was entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 483 (1991).

We affirm the judgment of the Boyd Circuit Court.[3]

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ernest M. Pitt, Jr.
Ashland, KY

J. David Smith, Jr.
Douglas P. Romaine
Lizbeth Ann Tully
Lexington, KY

BRIEF FOR APPELLEE:

Daniel King, III
Asst. Boyd County Attorney
Catlettsburg, KY

Cathy Cravens Snell
Division of Legal Services
Frankfort, KY

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[3] To the extent that we are affirming the trial court for different reasons than it gave in its judgment, we have the authority to do so. *See Revenue Cabinet v. Joy Technologies, Inc.*, Ky. App., 838 S.W.2d 406, 410 (1992).

COMMONWEALTH OF KENTUCKY
BOYD CIRCUIT COURT
DIVISION II
96-CI-00227

BOYD COUNTY, KENTUCKY, PLAINTIFF,

-VS- FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

(Filed Jan. 23, 1997)

COOKSEY BROTHERS DISPOSAL COMPANY, INC., DEFENDANT.

The plaintiff having moved for summary judgment and the court having considered the memorandums of law filed by both parties and being otherwise fully and sufficiently advised, hereby makes the following Findings of Fact, Conclusions of Law and Judgment, to wit:

FINDINGS OF FACT

1. The court finds that it has personal jurisdiction over all the parties to this action and has subject matter jurisdiction of the issues set forth in the Complaint.

2. The court finds that the defendant, Cooksey Brothers Disposal Company, Inc. (hereinafter "Cooksey") owns certain assets situated in Boyd County, Kentucky, and operates therein a municipal solid waste disposal facility as defined by KRS 224.005(15), where solid waste is disposed by the landfilling method.

3. The court finds that certain assets owned by Cooksey situated in Boyd County, Kentucky, are subject to the franchise tax set forth in KRS 136.120(1), as amended in 1991, which is in fact an *ad valorem* property

tax on the intangible assets of its business, *Greene v. Louisville & I.R. Co.*, 37 S.Ct. 673, 244 U.S. 499, 61 Led 1280 (1917).

4. The court finds no legal significance to Cooksey's argument that it is not a public service corporation or a public utility. The plaintiff has conceded that Cooksey is not a public service corporation nor a public utility, but those are not the only business entities subject to the provisions of KRS 136.120. The word "franchise" as used in KRS 136.120 means a tax on the franchise of every corporation, company or association performing any public service, and is not employed in any technical sense, but when construed with other nearby sections, it is plain that the legislature intended that the entire property, both tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should first be valued as an entirety, then the value of the tangible property be deducted, and the value of the intangible property thus ascertained to be taxed under these provisions, *Adams Express Company v. Kentucky*, 166 U.S. 171, 41 L.Ed. 960 (1897).

5. The court finds no hostile or oppressive discrimination against Cooksey by inclusion of its business in KRS 136.120.

CONCLUSIONS OF LAW

6. The franchise tax as set forth in KRS 136.120(1) is not arbitrary, unreasonable, hostile or oppressive as to Cooksey or the business in which it is engaged. Cooksey, and all other solid waste landfill businesses, are obligated to pay the same rate of tax on their respective intangible

assets as all other businesses set forth in that statute. The presumption of constitutionality of KRS 136.120 can only be overcome by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular person and classes, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, *Madden v. Kentucky*, 309 U.S. 83, 88, 84 L.Ed. 590 (1940). Cooksey has failed as a matter of law to meet its burden with regard to the constitutionality of KRS 136.120.

7. It is well within the constitutional authority of the Kentucky General Assembly to classify what types of businesses and what assets of those businesses are subject to the franchise tax provided in KRS 136.120, so long as a rational basis exists for any such classification, *Com., Revenue Cabinet v. Smith*, 875 S.W.2d 873 (Ky. 1994), *cert. den. sub nom. Yeoman v. Commonwealth*, ___ U.S. ___, 115 S.Ct. 509 (1994).

8. The General Assembly has set forth a rational basis for including businesses that engage in solid waste disposal by the landfill method in KRS 136.120, and Cooksey has not demonstrated as a matter of fact or law that inclusion of that particular business is an unreasonable classification or special legislation that is somehow oppressive or hostile to Cooksey or its particular business. Nor has Cooksey met its burden to negative every conceivable basis which might support the franchise tax imposed upon its intangible assets, *Madden, supra*.

9. The plaintiff is entitled to judgment against the defendant for the franchise tax for the years set forth in the original Complaint, and the additional years which

were supplemented by leave of court pursuant to CR 15, as well as all interest and penalties thereon otherwise permitted by statute.

JUDGMENT

10. The plaintiff, Boyd County Kentucky, is hereby awarded Judgment against the defendant, Cooksey Brothers Disposal Company, Inc., in the amount of $32,180.94, plus all accrued interest and applicable penalties thereon as permitted by law.

11. There being no just cause for delay, this is a final, appealable Judgment pursuant to CR 54 and all other applicable law.

/s/ C.W. Hagerman
Judge, Boyd Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Judgment have been mailed, postage pre-paid, to:

Hon. Daniel King, III
Assistant Boyd County Attorney
Courthouse, P.O. Box 425
Catlettsburg, KY 41129

Hon. Ernest M. Pitt, Jr.
HOLBROOK & PITT
200 Home Federal Building
1500 Carter Avenue
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Hon. Robert L. Templeton
ROBERT L. TEMPLETON, P.S.C.
613 – 13th Street
P.O. Box 1919
Ashland, Kentucky 41105-1919

This the 23 day of January, 1997

NANCY KAY ARTHUR, BOYD CIRCUIT CLERK

BY: /s/ Rita Bloebaum D.C.

Supreme Court of Kentucky

97-SC-1110-D
(97-CA-400-MR)

COOKSEY BROTHERS
DISPOSAL COMPANY, INC. MOVANT

V. BOYD CIRCUIT COURT
96-CI-227

BOYD COUNTY, KENTUCKY
RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED May 13, 1998.

/s/ Robert F. Stephens
Chief Justice